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Recent Cases

LANDLORD AND TENANT—TENANTABLE CONDITION OF PREMISES—RELATION OF LANDLORD'S STATUTORY OBLIGATIONS TO COMMON LAW WARRANTY OF HABITABILITY

Boston Housing Authority v. Hemingway, 293 N.E.2d 831
(Mass. 1973)

The movement to restructure landlord-tenant law, at one time a cause championed only by legal commentators,¹ has secured a position in the mainstream of legal thought. Both legislative enactments² and a growing body of case law³ bear witness to the development of an emerging consensus that the continued application of feudal concepts of land tenure to the modern residential tenancy consistently produces inequitable results. The solution offered by the reformers has been the replacement of a traditional property law analysis of lease obligations with an approach keyed to contract doctrine.⁴ In the transition, however, contract analysis has apparently begun to assume in the judicial mind a certain talismanic quality. "Contract" has become more a reflex response than a route to well-reasoned resolution of landlord-tenant disputes in the courts. Up to now, this development has not significantly reduced the immediate impact of recent decisions, but such goal-oriented jurisprudence raises serious doubts as to the ultimate value of case law in improving the condition of the residential tenant. The available evidence demonstrates that it may hinder the construction of an orderly

1. See, e.g., Bennett, *The Modern Lease—An Estate in Land or a Contract*, 16 TEXAS L. REV. 47 (1937); Friedman, *The Nature of a Lease in New York*, 33 CORNELL L.Q. 165 (1947); Note, *The California Lease—Contract or Conveyance?*, 4 STAN. L. REV. 244 (1952).

2. E.g., CONN. GEN. STAT. ANN. § 19-347a through h (1969); MICH. COMP. LAWS ANN. §§ 125.530, .534 (Supp. 1974); N.J. STAT. ANN. § 2A:42-79 (Supp. 1974). See Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1194 n.124 (1971), for an exhaustive list of pertinent statutes.

3. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Fritz v. Warthen*, 213 N.W.2d 339 (Minn. 1973).

4. *Id.*

sequence of precedents. In their haste to apply contract doctrine, some courts have delivered decisions that are too broad for the narrow fact situations presented for adjudication.⁵ Others have clothed their decisions in the vocabulary of reform only to resolve issues according to strict property theory.⁶

The frequent appearance of such errors compels a critical scrutiny of landlord-tenant cases for adherence to sound common law analysis⁷ and conceptual accuracy in the property-contract debate. Perhaps, though, the most significant question to be answered by such an inquiry is whether courts, which profess to be sympathetic to the tenants' cause, have misdirected their efforts by opting for a thoroughgoing contract analysis of the residential lease.⁸

5. See, e.g., *Pines v. Persson*, 14 Wisc. 2d 590, 111 N.W.2d 409 (1961); 45 MARQ. L. REV. 630 (1962). In *Pines* the court implied a warranty of habitability into a lease when no such innovation was required by the facts of the case. The premises were furnished and leased for immediate occupancy; thus, the case should have been governed by the exception to the rule of caveat emptor for furnished premises rented "for immediate residence." This rule was set forth in *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892), a case cited in *Pines*. 14 Wisc. 2d at 595, 111 N.W.2d at 412. Furthermore, there was evidence in *Pines* of an express warranty, which should have made any reference to an implied warranty unnecessary. Moreover, since the tenants had abandoned the premises, the case could have been based on constructive eviction, rather than breach of an implied warranty. See also *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1969). The Wisconsin Supreme Court itself may have impliedly discredited *Pines* by not citing it in a later action for rent where the tenant's defense was violations of the housing code. *Posnanski v. Hood*, 46 Wisc. 2d 172, 174 N.W.2d 528 (1970).

6. See, e.g., *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1969).

7. See generally Speech of Dean Roscoe Pound, University of Cincinnati Conference on "The Status of the Rule of Judicial Precedent," Feb. 17, 1940, in 14 U. CIN. L. REV. 324 (1940). See also H. HART & A. SACKS, *THE LEGAL PROCESS* 366-68 (1958). The fundamental notion of these commentators is that the expression of societal objectives by the judiciary should be no more than an incident of the duty to adjudicate fairly: "Conscious reshaping must . . . hold the degree of movement down to the degree to which need truly presses." K. LLEWELLYN, *THE BRAMBLE BUSH* 157 (2d ed. 1951).

8. The need for close scrutiny is further intensified by the national impact which many landlord-tenant cases have had. For example, a New York court has already stated that *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970), is "destined . . . to be a landmark decision." *Amanuensis, Ltd. v. Brown*, 65 Misc. 2d 15, 21, 318 N.Y.S.2d 11, 18 (New York City Civ. Ct. 1971). *Javins* is also cited as strong support in many other recent state decisions. *Green v. Superior Court*, 10 Cal. 3d 616, 623, 517 P.2d 1168, 1172, 111 Cal. Rptr. 704, 708 (1974); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 841-42 (Mass. 1973); *Fritz v. Warthen*, 213 N.W.2d 339, 341 (Minn. 1973).

One recent judicial attempt to come to terms with the needs of the modern residential tenant is *Boston Housing Authority v. Hemingway*.⁹ After repeated requests that the landlord, the Boston Housing Authority, repair defects which made their units in a public housing project uninhabitable, tenants Ruth Hemingway and Ruth Briggs began withholding rent.¹⁰ The landlord, a municipal housing agency,¹¹ then instituted proceedings in the Municipal Court of Roxbury to recover possession and rent due under the terms of the lease.¹²

The tenants pleaded in defense that their failure to pay rent was consistent with the rent withholding statute of Massachusetts.¹³ They alleged that there were defects on their premises that constituted violations of the Massachusetts State Sanitary Code¹⁴ and that these violations had, in turn, been certified by the Boston Housing Inspection Division as sufficient to invoke the statute.¹⁵ Alternatively, the tenants pleaded a breach of an implied warranty of habitability by the landlord.¹⁶

The trial court, sitting without a jury, rejected both defenses and granted the landlord possession of the premises as well as a judgment for the rent due under the lease.¹⁷ Pursuant to a special common law right, the tenants obtained a trial de novo before the Su-

9. 293 N.E.2d 831 (Mass. 1973).

10. *Id.* at 835.

11. MASS. GEN. LAWS ANN. ch. 121, § 26K (1969); see note 97 *infra*.

12. 293 N.E.2d at 835.

13. MASS. GEN. LAWS ANN. ch. 239, § 8A (Supp. 1974).

14. The code violations alleged in *Hemingway* included leaky ceilings, wet walls, improper heating, broken doors and windows, and infestation by rodents and other vermin. 293 N.E.2d at 835 n.2. The provisions of the State Sanitary Code in issue in *Hemingway* are contained in Article II, "Minimum Standards of Fitness for Human Habitation." Angevine & Taube, *Enforcement of Public Health Laws—Some New Techniques*, 52 MASS. L.Q. 205, 207 (1967). Article II is the Massachusetts counterpart of the Housing Regulations of the District of Columbia which were involved in *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

15. 293 N.E.2d at 835. MASS. GEN. LAWS ANN. ch. 239, § 8A (Supp. 1974), requires that violations of the Code must "endanger or materially impair the health or safety, and the well-being of any tenant therein or persons occupying the premises . . ." This finding must be made, as it was in *Hemingway*, by the report of a housing inspector.

16. 293 N.E.2d at 835.

17. *Id.* The full impact of the court's holding was felt only by defendant Hemingway. Defendant Briggs had vacated her apartment before the judicially mandated eviction; hence, her appeal to the Supreme Judicial Court was based solely on the judgment for the rent owed. *Id.* at 835 n.3.

perior Court of Suffolk County.¹⁸ They again pleaded the rent withholding statute in defense and requested a ruling that, regardless of the statute, the conditions of the dwelling constituted a breach of the landlord's obligation to provide a dwelling in compliance with the provisions of the Sanitary Code.¹⁹ They argued that this breach should be a defense to an action for summary eviction and that the extent of the breach, and not the terms of the lease, should determine the amount of compensation due the landlord for the occupancy of the premises during the period of withholding.²⁰ The Superior Court did not reach these issues; rather, it held that the failure of the tenants to give the landlord notice of their intention to withhold rent, in the manner required by the statute, was dispositive.²¹ The court therefore affirmed the eviction and the award given by the original trial court.²²

On appeal, the Supreme Judicial Court of Massachusetts agreed that the eviction was proper, but stated that "in a rental of any premises for dwelling purposes, under a written or oral lease, for a specified time or at will, there is an implied warranty that the premises are fit for human occupation."²³ Consequently, the tenants were forced to surrender possession, but were obligated to pay only the reasonable rental value of the premises for the period of occupancy.

A minority of the court set forth a persuasive concurring-dissenting opinion,²⁴ in which it agreed with the conclusion of the majority on the question of eviction, but argued that the wiser alternative to a common law warranty of habitability was the more predictable ap-

18. Appeal of actions involving summary process is to the superior court, where trial de novo may be obtained. *Di Natali v. Jackson*, 43 Mass. App. Dec. 212 (1970). When a tenant appeals a decision on summary eviction a bond for rent owed must be paid into court. MASS. GEN. LAWS ANN. ch. 239, § 5 (Supp. 1974).

19. 293 N.E.2d at 843-45.

20. *Id.* at 836.

21. When first enacted, Massachusetts General Laws ch. 239, § 8A required the tenant to give written notice to the landlord clearly stating his intention to withhold rent pursuant to the inspection report. This requirement has since been amended to permit the Housing Inspection Department that conducted the inspection to satisfy the notice requirement by written notice to the landlord of all violations. MASS. GEN. LAWS ANN. ch. 239, § 8A (Supp. 1974). See 293 N.E.2d at 836 n.5.

22. In reaching this conclusion, both lower courts rejected the existence of any common law warranty of habitability in Massachusetts and reaffirmed the property principle of independent covenants. 293 N.E.2d at 835. See also *Fiorntino v. Mason*, 233 Mass. 451, 124 N.E. 283 (1919).

23. 293 N.E.2d at 843.

24. The vote of the *Hemingway* court was 4 to 3.

proach of implying the standards of the existing Sanitary Code of Massachusetts into the residential lease as the absolute index of the landlord's obligations.²⁵

The assumption that any effective assault on the property theory of the residential tenancy must take place on two fronts, those of the doctrine of caveat emptor and the rule of independent covenants, pervades both the majority and minority opinions. This assumption was explicitly adopted in the leading case of the District of Columbia Court of Appeals in *Javins v. First National Realty Corp.*²⁶ The *Javins* court abandoned the application of property concepts to the residential lease and concluded: "In our judgment, the trend toward treating leases as contracts is wise and well-considered. Our holding in this case reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract."²⁷

25. 293 N.E.2d at 853.

26. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

27. 428 F.2d at 1075. The issue of whether the landlord had a contractual duty to maintain the premises was squarely presented in *Javins*. The court held that there existed, through the vehicle of an implied warranty of habitability, an obligation on the part of the landlord of a residential dwelling to rent only habitable premises and to maintain those premises in good repair for the duration of the lease. The court also held that a tenant who withheld rent pursuant to the violation of the landlord's duty to provide habitable premises could not be evicted provided he paid the reasonable value of the premises when a court so ordered. *Id.* at 1083. Paradoxically, while both the majority and minority opinions in *Hemingway* purport to rely on the *Javins* approach, neither opinion would permit the tenant to retain possession of the premises under the same circumstances. 293 N.E.2d at 843, 845, 854. See notes 78-107 *infra* and accompanying text. It is the impact of this judicially formulated remedy which ultimately leads the majority in *Hemingway* to remark that its holding is "far less radical" than that of *Javins*. *Id.* at 842 n.11.

Apparently, the *Hemingway* court feels that its holding is more firmly grounded in the statutory and common law of its jurisdiction than was *Javins*. The legislature of Massachusetts had given every indication that it favored liberal tenant remedies by the passage of remedial statutes. Moreover, the basis for an implied warranty had been laid in the common law of Massachusetts by the case of *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892). *Ingalls* established the exception to the rule of caveat emptor when the premises involved were furnished and therefore prepared "for immediate residence." 156 Mass. at 350, 31 N.E. at 286.

[T]here are good reasons why a different rule should apply to one who hires a furnished room Its fitness for immediate use . . . is a far more important element entering into the contract than when there is a mere lease of real estate An important part of what the [tenant] pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use.

Id. In the context of *Ingalls*, the *Hemingway* court seems to view the common law implied warranty as simply "an idea whose time has come." Indeed, the *Hemingway* majority describes the implied warranty as extending to all prem-

Under the traditional property theory the tenant bargained only for an estate in land; the landlord had no obligation beyond the duty to deliver possession.²⁸ If, on the other hand, the lease transaction is analyzed under contract theory, the resulting obligations are defined in terms of the expectations of the parties to that contract.²⁹ *Javins* states that those expectations extend to a "well known package of goods and services."³⁰ The *Hemingway* majority similarly concludes that the landlord's obligation is "to deliver and maintain the premises in habitable condition."³¹ The common denominator is plain. The landlord must provide, first, a physical space, and second, a physical space that is habitable. The issue that splits the *Hemingway* court is the relationship between the implied warranty of habitability and the existing Sanitary Code.³² The majority in *Hemingway* asserts not only that code violations can exist that do not constitute substantial breaches of the landlord's obligations, but that there are conditions or defects that affect habitability which may not be included in the code.³³ The *Hemingway* minority, how-

ises leased for "immediate occupation"—a phrase nearly identical to that used by the *Ingalls* court. 293 N.E.2d at 838. It should be noted that *Ingalls* has become a popular vehicle for courts dealing with landlord-tenant disputes. *Javins* used *Ingalls* to justify its decision. 428 F.2d at 1078. One of the most recent landlord-tenant cases concludes: "Our decision today may be seen as a logical development of the common law principles embodied in the *Ingalls* decision." *Green v. Superior Court*, 10 Cal. 3d 616, 626-27 n.11, 517 P.2d 1168, 1174-75 n.11, 111 Cal. Rptr. 704, 710-11 n.11 (1974).

28. 1 AMERICAN LAW OF PROPERTY §§ 3.45, 3.78 (A. Casner ed. 1952). Even under property theory, the covenant to pay rent was dependent on the delivery of possession to the lessee. It was this exchange—payment for a conveyance—that was the essence of the lease transaction. Even this obligation was not absolute, however, if the inability to give possession resulted from the conduct of a third person. See, e.g., *Teitelbaum v. Direct Realty Co.*, 172 Misc. 48, 13 N.Y.S.2d 886 (Sup. Ct. 1939).

29. See note 37 *infra*.

30. 428 F.2d at 1074.

31. 293 N.E.2d at 842.

32. *Javins* states that the implied warranty is "measured by the standards set out in the housing regulations for the District of Columbia." 428 F.2d at 1072. The conflict over the use of existing housing standards as the measure of the warranty may obscure its importance as a prime motivation for implying a warranty of habitability in the first instance. See *id.* at 1079; note 36 *infra* and accompanying text. On its face, *Javins* appears to follow the reasoning of the minority in *Hemingway*; that legislative enactments are at least determinative of the "outer limits" of the implied warranty of habitability in that there are no penumbral violations of the implied warranty lying outside the terms of the statute. 428 F.2d at 1080, 1081 n.57. However, the *Javins* court concludes that certain breaches of the housing code may also be de minimis. 428 F.2d at 1082 n.63.

33. 293 N.E.2d at 851.

ever, posits that the Sanitary Code is controlling and that any violation of its provisions therefore is a material breach of the landlord's obligations.³⁴

The majority in *Hemingway* builds its case for the common law implied warranty of habitability on an analysis of legislative intent. It treats the existing set of standards embodied in the Sanitary Code as a springboard for development of the common law; these statutory standards are considered by the court to be evidence that the legislature favored the development of some set of standards for housing maintenance. As such, the statutory standards represent a "policy judgment"³⁵ of the legislature and provide a set of "threshold requirements" with which "the protection afforded by the implied warranty or [*sic*] habitability does not necessarily coincide"³⁶

From the standpoint of contract doctrine, the disdain of the majority for the technical requirements of the Sanitary Code as the standard for the implied warranty seems well-advised. In order to give rise to the duty of reciprocal performance, an implied covenant need only be substantially or materially performed, unlike an express covenant, which must be literally and technically carried out.³⁷

34. See notes 44-46 *infra* and accompanying text.

35. *Pines v. Persson*, 14 Wisc. 2d 590, 595-96, 111 N.W.2d 409, 412 (1961), cited in *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 843 (Mass. 1973).

36. 293 N.E.2d at 844 n.16; see *id.* at 841 n.10: "[R]emedial legislation designed to promote safe and sanitary housing does not preclude the courts from fashioning new common law rights and remedies to facilitate the policy of safe and sanitary housing embodied in the [rent] withholding statutes." *But cf.* *Lindsey v. Normet*, 405 U.S. 56, 74 (1972): "Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions." For a statute which contains a warranty of habitability obligation as well as a duty to comply with a housing or health code, see OHIO REV. CODE ANN. §§ 5321.04(1)-(2) (Baldwin Supp. 1974).

37. L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 664-65 (1970); 5 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 675 (3d ed. W. Jaeger 1963) [hereinafter cited as WILLISTON]. The notion that the implied warranty of habitability is a warranty implied in law is well-camouflaged in most cases. The cases typically make reference to the expectations of the parties, which is characteristic of an implied in fact contract; but they also cite the requirement of substantial performance, which is inherent in an implied-in-law contract. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1081 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 842 (Mass. 1973).

The key to the problem may lie in the close relationship of the implied warranty of habitability and the warranty of merchantability. In one sense the implied warranty of merchantability is what the parties intended to bargain for. See *Haskell, The Case For an Implied Warranty of Quality in Sales of*

The Massachusetts rent withholding statute also appears to contain a materiality standard.³⁸ Thus, a breach of the implied warranty cannot be founded on intolerance with minor problems.³⁹ Furthermore, the mere existence of a housing or health code cannot guarantee any absolute answer to the question of the extent of breach since the materiality of a breach is a question of fact.⁴⁰ The majority opinion sets forth a number of factors significant in determining the extent of the breach;⁴¹ however, in doing so, it emphasizes that the only way to ensure justice is by ad hoc adjudication.⁴²

Real Property, 53 GEO. L.J. 635, 652 (1962). In another sense, the warranty is too crucial to be based on the intent or expectations of the parties. See Jaeger, *Warranties of Merchantability and Fitness for Use*, 16 RUTGERS L. REV. 493, 503 (1962). The end result is that the implied-in-law character of the warranty predominates. It would appear that this situation parallels that of the implied warranty of habitability: "It is precisely such expectations that the law now recognizes as deserving of formal, legal protection." 428 F.2d at 1079. But see 6 WILLISTON § 890A.

38. See note 15 *supra*.

39. *Academy Spires, Inc. v. Jones*, 108 N.J. Super. 395, 403, 261 A.2d 413, 417 (1970): "The warranty is one of habitability and is not a warranty against all inconvenience or discomfort."

40. See 293 N.E.2d at 843. The court appears to focus on the inadequacy of a housing code as a tool for evaluating actual uninhabitability. As one commentator has remarked, "A housing code cannot provide for every safeguard; nor is compliance with every one of its technical provisions necessary for a habitable dwelling." Note, *Implied Warranties and Rent Withholding in Urban Leases*, 66 NW. U.L. REV. 227, 242 (1971).

41. The criteria set out by the *Hemingway* court include: (1) the seriousness of the claimed defects; (2) the length of time the defects persisted; (3) whether the landlord or his agents received written or oral notice of the defects; (4) the possibility that the premises could be made habitable within a reasonable time; (5) whether the defects resulted from the conduct of the tenant. 293 N.E.2d at 843-44. See also *Lund v. MacArthur*, 51 Hawaii 473, 476, 462 P.2d 482, 484 (1969); *Mease v. Fox*, 200 N.W.2d 791, 796-97 (Iowa 1972); *Kline v. Burns*, 111 N.H. 87, 93, 276 A.2d 248, 252 (1972).

42. The trial court must have the same broad discretion to determine whether there is a material breach given the special circumstances of each case as that accorded the board of health under Reg. 39 of the Code which allows the board to vary the application of any provision with respect to a particular case. 293 N.E.2d at 844 n.16.

The majority seems to advocate a flexible habitability standard based on the needs and expectations of both tenants and landlords. For example, breach of the warranty may be material if the tenant is aged or disabled; but the same breach when the tenant is young and healthy may not be considered material. Likewise, the materiality of the breach may depend, to some extent, on factors external to the breach itself: for example, the financial position of the landlord. Indeed, once the warranty of habitability is implied into the lease, it is logical to allow courts to enforce that standard in a flexible manner. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1081 n.56 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Reese v. Diamond Housing Corp.*, 259 A.2d 112, 113 (D.C. Ct. App. 1969).

The minority presents a convincing rebuttal to the legislative intent argument by alluding to a cardinal rule of statutory construction. There is no better evidence of legislative intent than the words of the statute enacted.⁴³ In fact, the minority contends, the comprehensiveness of the standards in the Sanitary Code effectively undermines any suggestion that the code is merely an indication of a vague policy decision.⁴⁴ The minority supports its argument for the implication of existing statutes and health regulations into leases with a formidable body of case law.⁴⁵ In the process, the minority defeats the majority's contention that the open-ended implied warranty of habitability is favored by the great preponderance of judicial decisions, and concludes that the scope of the implied warranty in the

43. 293 N.E.2d at 848; see, e.g., *Caminetti v. United States*, 242 U.S. 470, 485-86 (1916); *Hamilton v. Rathbone*, 175 U.S. 414, 419, 421 (1899).

44. 293 N.E.2d at 848, 851. The State Sanitary Code provision appears in MASS. GEN. LAWS ANN. ch. 111, § 127A (1966). It should be noted that the Code provision was formerly located elsewhere in the General Laws, but was relocated in the section of the Code that sets forth the initial tenant remedies in Massachusetts. 293 N.E.2d at 839 n.6. This could conceivably be viewed as evidence that the code was to be the exclusive standard for those tenant remedies and all such remedies subsequently enacted by the legislature, as well as any judicially developed remedies.

By looking further behind the words of the statute, a very practical justification for defining the limits of the statutory rent-withholding provisions according to the Sanitary Code becomes evident. This argument is based on the most fundamental kind of legislative intent: that statutes enacted be put to use. Many statutes and sets of regulations similar to the Massachusetts Sanitary Code were enacted to implement programs designed to achieve better housing through the application of public sanctions—the so-called public code enforcement strategy. The failure of such efforts is well-documented. *Jackson v. Rivera*, 65 Misc. 2d 468, 470, 318 N.Y.S.2d 7, 9-10 (New York City Civ. Ct. 1971); see *Angevine & Taube*, *supra* note 14, at 217. See generally *Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965). When these programs stalled, efforts were redirected toward the development of private remedies. 293 N.E.2d at 839. The crux of the argument, then, is that the goal to which the codes were directed—the improvement of housing—is identical to the goal of the private remedy effort. Thus it would only be logical to use the same standards. Moreover, because of the demise of the code enforcement effort, the statutory standards must be utilized in the private remedy area simply to justify their continued existence. To fail to do so would “reduce the statute to an empty, meaningless form of words.” *Jackson v. Rivera*, 65 Misc. 2d at 471, 318 N.Y.S.2d at 10.

45. 293 N.E.2d at 852-53; see *Whetzel v. Jess Fisher Management Co.*, 282 F.2d 943 (5th Cir. 1960); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Morbeth Realty Corp. v. Rosenshine*, 67 Misc. 325, 323 N.Y.S.2d 363 (New York City Civ. Ct. 1971). See also *Schosinski, Remedies of the Indigent Tenant: Proposals for Change*, 54 GEO. L.J. 519, 523 (1966).

case before it is limited to the standards set forth in the Code.⁴⁶ Thus a breach of any provision of the Code is inherently a substantial breach of the landlord's obligations.

The majority's position that the warranty of habitability should be expanded to include defects not explicitly covered by the statute ignores the practical need of the tenant for a fixed standard. Because of the inherent vulnerability of the tenant, it is necessary to offer him a certain amount of predictability of result before he will resort to any private remedy.⁴⁷ The flexibility of ad hoc adjudication cannot, in the eyes of the tenant, compensate for its inherent uncertainty. Nor, for that matter, can it compensate for the extraneous costs of litigation which necessarily accumulate with the passage of time.⁴⁸ Moreover, though the plight of the tenant is typically

46. Although some of the decisions on which the court seems to place its greatest reliance include in their discussions general language about the implication of a warranty of habitability, it is clear from the express language of their holdings that they imply a warranty of habitability which is limited to the minimum standards prescribed by applicable statutes, ordinances, by-laws, codes, rules and regulations. 293 N.E.2d at 852; see *Hinson v. Delis*, 26 Cal. App. 3d 62, 71, 102 Cal. Rptr. 661, 666 (1972). But see *Lund v. MacArthur*, 51 Hawaii 473, 476, 462 P.2d 482, 484 (1969). A survey of case law reveals, in fact, only one case, *Kline v. Massachusetts Ave. Corp.*, 439 F.2d 477 (D.C. Cir. 1970), that has imposed an implied warranty obligating the landlord without reference to an existing statute. The issue before the court in *Kline* was the liability of a landlord for failure to provide a dwelling in which tenants were secure from attacks. There the court concluded that the landlord's duty to protect the tenant stems from "the logic of the situation." *Id.* at 483.

47. In using almost any common law private remedy, the tenant is gambling with his right to possession. This course is evident in the common law rent withholding remedy formulated in *Hemingway*. To a lesser extent the same risk is present in applying the *Javins*-style remedy. In *Javins* there is no requirement of inspection by housing officials to determine whether the alleged defect is in violation of the housing code. By allowing the tenant the luxury of deciding for himself whether his dwelling is uninhabitable, *Javins* exposes the tenant to the possibility that he may be forced to surrender possession if he withholds rent when there are no violations of the housing code or when the existing violations do not constitute a substantial breach. 428 F.2d 1082 n.62. In addition, eviction would occur if the tenant failed to pay the amount owed after appropriate deductions for unsuitable conditions.

48. In *Hemingway*, the defects complained of developed some time before the beginning of rent withholding by the tenants. The decision of the Supreme Judicial Court of Massachusetts was delivered more than 4 years after the defects became apparent. On its face, this is a drastic example because of the lengthy appeal process. However, if the implied warranty is to be applied on a case-by-case basis, this would, in itself, encourage appeals of adverse judgments, because of the uncertainty of the issue. This problem has been somewhat alleviated by legislative developments. If the *Hemingway* case were pursued today, it would fall under the jurisdiction of the recently created Boston Housing Court. MASS. GEN. LAWS ANN. ch. 185A, §§ 1, 3

the focus of discussions of proposed remedies, the landlord is similarly disadvantaged by the common law warranty. He is placed in the precarious position of having an obligation to perform and never knowing for certain the extent to which he has met his obligation.

An examination of the motivation of the *Hemingway* court, moreover, reveals that there is no compelling reason for exposing the tenant or the landlord to such problems. The court suggests that its only purpose is to resolve some perceived inconsistency between statutory and common law.⁴⁹ The court apparently felt the need to remove any vestiges of traditional property law doctrine to destroy this "illogical state."⁵⁰ It is doubtful whether the resolution of this inconsistency is justified in view of the probable ill effects on the principals involved in a residential tenancy.

The majority compounds the problem of uncertainty by remarking: "This warranty (insofar as it is based on the State Sanitary Code and local health regulations) cannot be waived by any provision in the lease or rental agreement."⁵¹ On its face, this statement prohibits the use of waiver. In the interstices, however, there is room to evade the prohibition. A careful reading of the statement reveals that it contains an implication that there can be a waiver of substantial defects affecting habitability if the defects are not covered by the Code or other regulations.

The position of waivers at law is not a favored one.⁵² Generally, the party waiving a right must do so intentionally and with knowledge

(Supp. 1974). The procedural rules there insure a much quicker disposition of housing controversies. See MASS. GEN. LAWS ANN. ch. 185A, §§ 20-30 (Supp. 1974). The housing court statute did not become effective until January 1, 1972, after the *Hemingway* case had begun appeal procedures.

49. General Laws c. 111, §§ 127A-127F and 127H, and G.L. c. 239, 8A, have already encroached to some degree on the common law rules of caveat emptor and independent covenants. If we fail to repudiate the underlying common law concept of a lease which fostered the independent covenants rule, the landlord-tenant law in Massachusetts will remain in an illogical state because our statutory and common law will be based on different conceptual assumptions as to the essential nature and consequences of a lease.

293 N.E.2d at 843.

50. *Id.*

51. *Id.*

52. Waivers are not presumed, and the burden of proof for one attempting to prove the existence of a waiver apparently extends beyond the normal standard of a preponderance of the evidence. "The assent [necessary to establish a waiver] must . . . be clearly established and will not be inferred from doubtful or equivocal acts or language." *Carfi v. DeMartino*, 181 Misc. 428, 431, 46 N.Y.S.2d 134, 136 (Sup. Ct. 1944). See also *Brandt v. Roxana Petroleum Corp.*, 29 F.2d 980, 982 (5th Cir. 1929).

of the right waived.⁵³ Because of the uncertainty that surrounds an implied warranty, it seems difficult to justify the waiver of such a right.⁵⁴ Waivers are even more suspect when they are invoked in an area such as housing, which is affected with the interests of society as a whole.⁵⁵ Finally, although there is no provision prohibiting waiver of common law tenant rights, there is a clear statutory policy against waivers in this area of the law.⁵⁶

The negative attitude of the courts and legislatures toward waivers might protect tenants from the implication that can be drawn from the language used in *Hemingway*. One might speculate that the anti-waiver prejudice is so strong that, even though the *Hemingway* opinion leaves room for waivers, no court would consider implying a waiver under any circumstances. But the possible preservation of waiver in *Hemingway* may overcome the judicial bias, since it is to that decision and not to waiver cases in other areas that courts will look for precedent in deciding landlord-tenant cases. The possibility that an express waiver provision might be enforced makes the position of the tenant significantly more uncertain.

In effect, the majority is willing to permit waiver of non-statutory breaches of the warranty as a trade-off for a standard of habitability which extends beyond that offered by statute.⁵⁷ The danger of this tactic, however, is that the flexibility of ad hoc adjudication does not necessarily operate in the tenant's favor. If a landlord can possibly save an otherwise invalid waiver provision by showing that it is not addressed to specific housing or health code provisions, he will almost surely attempt to establish in litigation that the defect complained of does not fall within the terms of a code provision, however minimal or literal the divergence from the code provision may

53. A waiver is defined as a "voluntary relinquishment of a known right." RESTATEMENT OF CONTRACTS § 297, comment *b* (1932).

54. A person clearly cannot waive a right he does not know he possesses. *Werking v. Amity Estates, Inc.*, 2 N.Y.2d 43, 52, 155 N.Y.S.2d 633, 642, 137 N.E.2d 321, 327 (1956). "[I]n the absence of an express agreement a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby" *Universal Gas Co. v. Central Ill. Pub. Serv. Co.*, 102 F.2d 164, 168 (7th Cir. 1939).

55. "Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945).

56. See MASS. GEN. LAWS ANN. ch. 111, § 127K (1966). See also *Buckner v. Azulai*, 251 Cal. App. 2d 1013, 1015, 59 Cal. Rptr. 806 (1967).

57. See 293 N.E. at 846, 851.

be. Thus, the common law implied warranty of habitability developed by the majority could easily be distorted into an exercise in hair-splitting. This, in turn, might result in a standard of habitability that would be, in fact, less stringent than that originally established by the Sanitary Code.

This does not mean that a similar contest would not ensue if the Sanitary Code were the sole standard of habitability, as the minority would hold. Indeed, proving that a defect does not fall within the terms of the Code is a more direct escape route for the landlord, since the question of waiver never arises. However, this route may be blocked because the courts are accustomed to dealing with such evasive tactics. Under the majority approach, though, the courts might well be baffled by the landlord's new strategy of admitting a breach of the warranty of habitability, only to prove that the breach lies beyond the scope of a housing or health code and is therefore subject to an express waiver contained in the lease.

From the standpoint of the defendants in *Hemingway*, the common law warranty of habitability provided some unexpected relief, while at the same time disappointing the rightful expectations of the landlord—expectations built on clear statutory language. However, prospects for neither landlord nor tenant are particularly bright under the warranty. The landlord has a new area of responsibility, while the tenant possesses what is perhaps the least desirable of all remedies—the opportunity to win a lawsuit. The minority perhaps best captures the potential danger of the common law implied warranty in referring to it as a “presently undefined, indeterminable and uncharted area of potential rights and liabilities of landlords and tenants . . . [which may] serve only to vex them and to produce litigation otherwise avoidable.”⁵⁸

Although the majority and the minority of the *Hemingway* court disagree on the source of the obligation to be imposed on the landlord, this disagreement does not disturb the consensus of the court as to the limited remedies available to a tenant whose landlord has, in fact, breached his obligation to maintain the premises. Historically, under the property theory of independent covenants, no breach by the landlord of any covenant could be pleaded in defense to an action to evict for failure to pay rent; the only strategy available to the tenant was to litigate his complaints in a separate action while meeting his obligations under the lease.⁵⁹

58. *Id.* at 852; see Comment, *The Implied Warranty of Fitness and Habitability*, 16 VILL. L. REV. 710 (1971).

59. 1 AMERICAN LAW OF PROPERTY, *supra* note 28, § 3.11.

There was one exception to this rule. Between the two covenants most essential to the lease transaction, the landlord's covenant to deliver possession and the tenant's covenant to pay rent, there existed a relationship of dependency; the breach of one such covenant would relieve the wronged party from the duty of performing the other.⁶⁰ If, however, the landlord has two essential covenants to perform—transfer of possessory rights *and* maintenance by virtue of an implied warranty of habitability⁶¹—the remedies available to the tenant should be substantially the same upon the breach of either of these covenants. If the tenant can either plead the breach of the landlord's covenant to transfer possession in defense to an action to recover rent or institute a separate action for damages, he should have a similar option when the landlord fails to maintain the premises in a habitable condition.⁶² It is this reasoning, often unspoken, that has led many modern courts, including *Hemingway*, to reject the property law's independent covenant analysis and to apply the contract rule of dependent covenants to the lease agreement.⁶³ This rule of dependent covenants raises habitability to a new dignity. According to this concept, the tenant's obligation to pay rent under the lease is conditional upon the landlord's performance of his own obligations.⁶⁴ The failure of the landlord to perform substantially the essential incidents of the residential lease transaction permits the tenant to withhold the performance of his obligation.

Unfortunately, while the judicial effort to elevate habitability to a realistic level of importance through the rule of dependent covenants had as its objective the establishment of a parity between the two essential covenants, it has resulted in a corresponding underemphasis of the most basic and immediate need of the tenant. Although efforts to improve the quality of rental housing are laudable, the primary concern of the typical residential tenant has been and continues to be the acquisition and retention of possession.⁶⁵ Though he wants a dwelling that is habitable, the tenant will invariably accept less when a habitable dwelling is not available.⁶⁶ The resi-

60. 3A A. CORBIN, CONTRACTS § 686 (1951) [hereinafter cited as CORBIN].

61. See text accompanying notes 30-31 *supra*.

62. 3A CORBIN § 655.

63. See note 3 *supra*.

64. *Javins v. First Nat'l Realty Corp.*, 429 F.2d 1071, 1082 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); 3A CORBIN §§ 633, 637.

65. Loeb, *The Low-Income Tenant in California: A Study in Frustration*, 21 HASTINGS L. REV. 287, 302 (1970).

66. Housing statistics show that many substandard units are occupied despite their apparent unsuitability for habitation. The REPORT OF THE NA-

dential tenant is often not even aware of the unsuitability of his dwelling until a "crisis in uninhabitability"⁶⁷ occurs. Intrinsically, habitability is contingent upon the existence and availability of a physical space. Habitability is a quality of that space, and therefore, it is necessarily collateral to the right to possess the space. In spite of judicial over-reaction against feudal tenurial concepts,⁶⁸ the right to possess a physical space remains the essence of the residential tenancy, primarily because the tight housing market dictates that result.⁶⁹

By their literal terms most recent decisions have disclaimed this idea. Rather, these courts have asserted that it is habitability and not possession that constitutes the most significant portion of the lease transaction.⁷⁰ *Hemingway* is among this group.⁷¹ It may well be, however, that this emphasis on the service obligation is partially a device to ensure that the warranty of habitability will be legally recognized as an essential part of the lease, and that the breach of this warranty will give rise to the normal contract remedies. The results reached by most courts which have elevated the status of habitability are certainly not consistent with the idea that the possessory interest has ceased to be a crucial element in the modern residential tenancy. These courts have actually recognized the importance of the possessory interest by refusing to condition the tenant's remedies for breach upon surrender of possession. The relief granted by the courts has been the monetary difference between the value of the "goods" as warranted (measured by the contract price)

TIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 257 (1965) stated that the number of substandard housing units at the time of publication was approximately six million. A more recent estimate placed the figure at 11 million. J. FRIED, *HOUSING CRISIS U.S.A.* 10 (1971).

67. Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. OF URBAN LAW 695, 699 (1969).

68. This sentiment reached its height in *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974). The court stated: "Today the habitability of the dwelling unit has become the very essence of the residential lease." 10 Cal. 3d at 635, 517 P.2d at 1180-81, 111 Cal. Rptr. at 716-17. It is interesting to note, however, that to follow this statement to its logical conclusion is to state that possession of uninhabitable premises is worthless—a fiction that is the basis of constructive eviction. See notes 91-94 *infra* and accompanying text; Schoshinski, *supra* note 45, at 527; cf. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078 (D.C. Cir. 1970).

69. See note 109 *infra* and accompanying text.

70. Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CALIF. L. REV. 670, 690.

71. "[R]ent is paid for habitable premises and not for an interest in real estate." 293 N.E.2d at 843.

and the value of the goods "as is" (measured by the actual value of the premises).⁷²

Under this standard of relief the question of eviction pursuant to rightful rent withholding never arises so long as the tenant pays the amount of rent the landlord "earned" when the value of the premises is established by a court.⁷³ Uninhabitability becomes a continuum along which the extent of the breach decreases the amount of compensation to which the landlord is entitled for the services he performed and the physical space he delivered.⁷⁴ Thus, while recent decisions are typically described as establishing that the covenant to pay rent is dependent on the habitability of the premises, the nature of the relief granted demonstrates that they might be more accurately characterized as establishing that the *amount* of rent owed is dependent on the habitability of the premises. The existence of a breach of the warranty of habitability merely triggers the operation of a setoff mechanism.⁷⁵ The obligation to pay rent, although perhaps postponed by statute, is never voided because, as with a contract for the sale of goods, breach of the implied warranty rarely reaches a point where the right to possession is actually worthless.⁷⁶ Moreover, as in the sale or lease of any commodity, objective judgments of worthlessness may not be considered dispositive because extraneous factors, such as market conditions, may make the goods valuable to

72. *E.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). See 11 WILLISTON § 1391; UNIFORM COMMERCIAL CODE § 2-714.

73. In *Javins* the problem facing the court was "whether housing code violations which arise during the term of a lease have any effect on the tenant's obligation to pay rent." 428 F.2d at 1072. If it was available as a defense in typical judicial proceedings, there was no question of its availability in summary actions. The availability of this defense was guaranteed by a rule of the Landlord and Tenant Branch of the Court of General Sessions of Washington, D.C. 428 F.2d at 1073 n.3.

This particular question was not before the court in *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974), where the question of the dependency of an implied warranty of habitability had already been settled in the jurisdiction by *Hinson v. Delis*, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972). The immediate issue was whether the breach of the implied warranty could be pleaded in defense of a summary action. The court held that it was a defense. 10 Cal. 3d 616, 636, 517 P.2d at 1181, 111 Cal. Rptr. at 717.

74. 428 F.2d at 1083; 293 N.E.2d at 845.

75. 428 F.2d at 1082. See UNIFORM COMMERCIAL CODE § 2-717.

76. It is difficult to develop a standard to determine the point of worthlessness. *Javins* appears to draw the line at total breach. 428 F.2d at 1083. The value of this standard is also doubtful.

the particular purchaser or lessee.⁷⁷

It was against this background that the *Hemingway* court, after implying a warranty of habitability, returned possession of the premises to the landlord in spite of his breach of that warranty. The remedy offered to the tenant was a rescission of the lease contract.⁷⁸ While this alternative follows as the result of a contractual analysis, it eliminates any protection of the possessory interest so critical to the tenants, since rescission traditionally involves returning the contracting parties to the same positions they occupied before the making of the contract.⁷⁹ The tenant is required to return, to whatever extent possible, all that he has received under the contract—here, possession of the premises. The landlord forfeits the difference between the contract price of the habitable premises and the reasonable value of the premises “as is” as restitution to the tenant for what is, in effect, an overpayment for the premises.⁸⁰

The pattern of events that serves as the basis for the court’s reasoning may be set out in a temporal sequence: first, the landlord breaches the implied warranty of habitability; second, the tenant refuses to perform his covenant to pay rent; third, the landlord evicts the tenant by summary proceeding; fourth, the landlord litigates the amount of rent due for the period of occupancy. It is the third step of this sequence that appears to defy explanation under contract

77. See Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DENVER L.J. 387, 391 (1967): “Quite often a long term lease is involved [in a possible action for rescission] and the demised premises have been selected for reasons collateral to the issues which may be raised in the rescission action.”

78. 293 N.E.2d at 843, 845. Both the majority and minority opinions purport to set forth two discrete common law remedies based on dependent covenants. (Each opinion also sets forth a common law independent covenants remedy. See note 104 *infra* and accompanying text.) The majority asserts that the tenant “can sue for rescission” or, if he is willing to suffer eviction, withhold his rent and pay only the reasonable value for occupancy. 293 N.E.2d at 843, 845. The minority states that the aggrieved tenant may “terminate the tenancy” or refuse to pay the agreed rent and subject himself to eviction. *Id.* at 854, 853. In fact the remedies provided by the majority are indistinguishable from those provided by the minority. In practical terms, all of these remedies assure that the tenant will be homeless, having “exchanged” his dwelling for the monetary difference between the required rent and the reasonable value of the premises.

79. 12 WILLISTON §§ 1454, 1457.

80. One argument for the validity of rescission theory is that allowing the tenant to remain in possession in return for the payment of the “reasonable value” of the premises is tantamount to the judicial creation of a new lease. 293 N.E.2d at 843-45. Cf. Note, *Rent Withholding and Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 331 (1965).

theory. Theoretically, the landlord's right to take such action should be restricted to the situation in which the action of the tenant in withholding rent is unjustified in view of the nature of the landlord's breach. Such would be the case only if that breach were insubstantial or if the covenant so breached were non-essential. If such were the case, the tenant's sole option would be to perform fully and then to sue for damages.⁸¹ The inconsistency is that, under the *Hemingway* holding, the implied warranty is an essential covenant and any breach of it is necessarily substantial. Thus, the right to withhold upon breach inheres in any application of contract theory.⁸²

In addition, traditional rescission theory does not justify the sequence outlined by the court. No rescission is valid without the restoration or offer to restore the goods to the other party to the contract.⁸³ Clearly, no such offer is present in *Hemingway*. Considering contemporary housing shortages, residential tenants would seldom offer to rescind a lease.⁸⁴ In fact the only election made by the tenant who fails to follow the statutory rent withholding procedures is the election to seek out some remedy, the exact nature of which the tenant himself probably has not determined when he decides to withhold rent. From the election to withhold rent, the *Hemingway* court extrapolates, or perhaps more accurately, mandates the "election" to rescind.⁸⁵

81. See notes 37-42 *supra* and accompanying text.

82. See notes 60-62 *supra* and accompanying text. If the court establishes the parity of the implied warranty of habitability with the covenant to deliver possession, it seems only logical that any breach of the implied warranty should be considered essential. See 293 N.E.2d at 842. It also appears that any implied warranty is inherently an essential covenant. "A covenant in a lease can arise by necessary implication from specific language of the lease or because it is indispensable to carry into effect the purpose of the lease." *Marini v. Ireland*, 56 N.J. 130, 143, 265 A.2d 526, 533 (1969).

83. 12 WILLISTON § 1460.

84. Schoshinski, *supra* note 45, at 527:

In line with relief available to a buyer of personal property when the goods purchased do not conform in breach of an implied warranty of fitness, a tenant would have the right of rescission, an action for damages, or both for the loss resulting from the landlord's breach. Thus, the tenant could abandon the premises without further liability for rent, but this is not usually the relief desired by the slum tenant because the housing shortage effectively curtails his freedom of movement.

See also Skillern, *supra* note 77, at 391.

85. According to *Hemingway*, the tenant whose statutory rent-withholding defense prevails is the only tenant who can practically be said to have the power to make an effective election. The *Hemingway* court states that if the statutory defense is actually litigated and the tenant is victorious, he may remain in possession by paying the reasonable value of the premises until the

In effect, the *Hemingway* court transfers the initiative for rescission to the landlord⁸⁶ and offers him what amounts to an initial, incontestable satisfaction of his frustration, if not a major part of his claim. The landlord, not the tenant, exercises this election. While it might be inaccurate to label this process legalized retaliatory eviction,⁸⁷ it seems clear that it is far from an equitable procedure. The process through which the landlord is allowed to regain possession originates, not in the rent withholding of the tenant, but in the landlord's own wrong in allowing the premises to become ill-suited for the purposes for which they were rented. It is the landlord's own wrongful conduct in the first instance that has precipitated his receipt of a benefit (possession and the opportunity to acquire a more compliant tenant). The undesirability of such a result is patent; it can only serve to encourage further wrongful conduct. At no point in the process does the *Hemingway* court assure the repair of uninhabitable housing even after the departure of the aggrieved tenant; rather, the court lays the groundwork for what could be an endless chain of tenancies and rescissions with no repair responsibility ever being assumed by the landlord.⁸⁸ Whether or not this takes place depends in large measure on the attitude of the courts in evaluating the reasonable value of occupying uninhabitable premises.⁸⁹

full rent obligation is revived by the landlord's repair of the defects. 293 N.E.2d at 844-45.

86. This approach is contrary to traditional contract law under which no party who has been guilty of the initial breach can sue for rescission based on the other party's failure to perform. 12 WILLISTON § 1468.

87. There is case law to the effect that eviction subsequent to an attempt to relieve grievances by using established procedures has been labeled "retaliatory." *E.g.*, *Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 863 (D.C. Cir. 1972). Retaliatory eviction has been prohibited in a number of federal decisions. *E.g.*, *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). *See also* *McQueen v. Drucker*, 438 F.2d 781 (1st Cir. 1972); MASS. GEN. LAWS ANN. ch. 239, § 9 (1967). It is obvious that it is impossible to eliminate the potential for reprisal by the landlord entirely. For example, even under the *Javins* rationale, once the landlord has lost his suit for summary eviction, he is still free to seek eviction at the termination of the lease term (which in many tenement dwellings is the next month) or "on any other legal ground." 428 F.2d at 1083 n.64.

88. The only way to break the chain would be to make the failure to repair unprofitable for the landlord. This might be achieved by holding the lease contract void *ab initio* from the time the first tenant leaves the premises because of a breach of the implied warranty of habitability. *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Ct. App. 1968). But this does little to protect the possessory interest of the tenant. Another option is to prevent the landlord from releasing the dwelling until repairs have been undertaken. *Robinson v. Diamond Housing Corp.*, 463 F.2d 855, 868-69 (D.C. Cir. 1972).

89. As a practical matter, it might be overly optimistic to believe that

But it should be noted that, for many landlords, any return is satisfactory as an alternative to further investment in what they consider worthless properties. The rescission remedy seems particularly suited to these landlords, who do not wish to "throw good money after bad."⁹⁰

In denying possession to the tenant who complains of an uninhabitable dwelling, the *Hemingway* court implicitly utilizes a familiar fiction: if the premises are uninhabitable, they obviously cannot be lived in. Despite the court's protestations that it is not dealing in such "legal fictions,"⁹¹ this rescission of the lease bears a definite resemblance to the remedy of constructive eviction. In its most basic form, constructive eviction results in the termination of the obligation to pay rent under a lease when there is an allegation that the premises contain defects that are so grave as to constitute a deprivation of the possessory interest by the landlord.⁹² This allegation must be accompanied by an actual abandonment of the premises.⁹³ In *Hemingway*, the tenants are compelled to surrender possession after refusing to pay rent for an allegedly uninhabitable dwelling. In addition, their rent obligation continues, at a reduced rate, to the time of actual surrender.

The difference between the result under a theory of constructive eviction and under the *Hemingway* rescission remedy is minimal. The distinction between the implied covenant of quiet enjoyment (the basis of the constructive eviction remedy) and the warranty of habitability has become so blurred that a number of courts, whose decisions are cited in *Hemingway*, have expressly equated the two covenants.⁹⁴ Both constructive eviction and rescission involve an

courts ingrained with the idea of the lease as a conveyance would be liberal in assessing the loss to the tenant on account of premises that are in breach of an implied warranty of habitability.

90. See G. STERNLIEB, *THE TENEMENT LANDLORD* 201 (1966).

91. 293 N.E.2d at 837.

92. The basis of the remedy of constructive eviction is a breach of the implied covenant of quiet enjoyment. *E.g.*, *Milheim v. Baxter*, 46 Colo. 155, 103 P. 376 (1909). One of the best statements regarding what constitutes a breach of this covenant appears in *Keating v. Springer*, 146 Ill. 481, 495, 34 N.E. 805, 808 (1893). There, a breach is said to consist of "acts of a grave and permanent character, which amount to a clear indication of intent on the landlord's part to deprive the tenant of the enjoyment of the demised premises."

93. See, *e.g.*, *Automobile Supply Co. v. Scene-In-Action Corp.*, 340 Ill. 196, 172 N.E. 35 (1930). But see *Majen Realty Corp. v. Glotzer*, 61 N.Y.S. 2d 195 (New York Mun. Ct. 1946).

94. *Marini v. Ireland*, 56 N.J. 130, 144, 265 A.2d 526, 534 (1969), refers to the distinction between the implied warranty of habitability and the covenant of quiet enjoyment as being purely "a matter of semantics." *Reste Re-*

election by the wronged party.⁹⁵ Furthermore, there have been a number of constructive eviction cases wherein the inability of the tenant to abandon immediately has resulted in the court's charging the tenant only the "reasonable value" of the leased premises prior to actual abandonment.⁹⁶ In fact, so common has this remedy become that it has attained the dignity of a legal doctrine, appropriately named "equitable constructive eviction."⁹⁷ Finally, although under *Hemingway* aggrieved tenants only are required to pay the reasonable value of the premises up to abandonment, rather than the full value, this does not distinguish the rescission remedy from that of traditional constructive eviction. The facts, therefore, point to the conclusion that the court in *Hemingway*, perhaps unwittingly, is recreating the duties and penalties incident to a remedy of constructive eviction and enforcing them through a holding of dependent covenants.⁹⁸ The court, in effect, is revitalizing an obsolete property remedy by clothing it in the jargon of contract theory.

The policy rationale offered by the court in forcing the tenant to surrender possession is somewhat more persuasive than is its claim that it was applying contract law rather than property law. The court suggests that it must consider the legislative policy underlying the present statutory remedy in fashioning alternative common law remedies.⁹⁹ Indeed, it is a legitimate judicial function to en-

alty Corp. v. Cooper, 53 N.J. 444, 460, 251 A.2d 268, 276 (1969) states: "[A] tenant's right to vacate leased premises is the same from a doctrinal standpoint whether treated as stemming from breach of a covenant of quiet enjoyment or from breach of any other dependent covenant."

95. The element of compulsion evident in *Hemingway* can be incorporated into the analysis by recognizing that the constructive eviction "election" was built on the notion that the landlord had so frustrated the possessory interest of the tenant as to constitute a command to abandon.

96. *E.g.*, Charles E. Burt v. Seven Grand Corp., 340 Mass. 124, 163 N.E.2d 4 (1959); see 1 AMERICAN LAW OF PROPERTY, *supra* note 28, § 3.52 n.4.

97. Note, *Public Housing*, 22 VAND. L. REV. 875, 977 (1969).

98. This may be seen as a reversal of the older common law trend of creating the duties of an implied warranty and enforcing them through a holding of independent covenants and constructive eviction. Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 DE PAUL L. REV. 69, 90 (1951). This result also reflects the changing role of constructive eviction, which was first created to circumvent the common law's refusal to recognize dependent covenants. Bennett, *The Modern Lease—An Estate in Land or a Contract*, 16 TEXAS L. REV. 47, 65 (1937). Constructive eviction has often been the actual holding behind the stated theory of dependent covenants in the sense that the fact situations before the courts have involved the actual abandonment of the premises pursuant to a claim of substandard conditions. See, *e.g.*, Lemle v. Breeden, 51 Hawaii 462, 426 P.2d 470 (1969).

99. See note 27 *supra* and accompanying text. The majority, at least, seems to give more force to the existence of the rent withholding statute than

courage the use of specific statutory remedies.¹⁰⁰ By so limiting the remedial effect of the common law, the court provides a measure of relief to the tenant who, for whatever reason, did not pursue his statutory remedy effectively, while insuring the continued viability of the statutory remedy by making it the most attractive alternative available to the aggrieved tenant.

Such a justification, however, fails for two reasons. First, the *Hemingway* court repeatedly asserts that its purpose is to create remedies that follow the policy of the legislature,¹⁰¹ to provide "defensive" remedies, which give the tenant "freedom from the fear of being evicted."¹⁰² This policy is violated by the judicially mandated eviction of tenants who pursue the common law rent withholding remedy. A second more damaging defect in the argument for a less effective common law remedy is that, in the hierarchy of remedies set forth by the court, the most beneficial remedy is still not statutory. Statutory rent withholding effects a waiver of the reduction of rent in return for the right to remain in possession. The common law damage remedy, on the other hand, allows the tenant to recover "some or all" of the rent paid as damages for the landlord's breach while retaining possession.¹⁰³

To take advantage of the common law remedy, the tenant must file suit for damages after faithful payment of the rent as provided

to the existence of the Sanitary Code. Where it is apparently justifiable to create a common law warranty of habitability that extends beyond the legislative standards of the Sanitary Code, any common law response to the rent withholding must be of lesser force to encourage the use of the statutory remedy. *But see* *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974), where the common law remedy offered by the court far outstripped the legislative repair-and-deduct remedy available in California.

100. *See* *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 853-54 n.3 (Mass. 1973): "As a matter of policy it is not desirable that a tenant who does not avail himself of these statutory remedies be permitted to continue to occupy the landlord's premises indefinitely without paying the rent."

101. *Id.* at 840.

102. The purpose of this amendment (MASS. GEN. LAWS ANN. ch. 239, § 8A (Supp. 1974)) was to provide a tenant with yet another means of enforcing the state sanitary code or local health regulations, but without the necessity for a timid tenant to initiate court proceedings in what may appear to be a frightening system. Thus, the law now arms the tenant with a defensive weapon—a shield to accompany his sword.

Angeline & Taube, *supra* note 14, at 228, cited in part in *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 840 (Mass. 1973).

103. 293 N.E.2d at 845 n.20. A portion of the rent reduction for insufficient services may be rebated to the landlord under an escrow system to effect repairs in the dwelling.

in the lease.¹⁰⁴ Obviously, this contradicts the stated concern of the court for defensive remedies. More important, however, is that this remedy is not founded on dependent covenants theory at all; breach of the landlord's covenant gives rise only to a separate cause of action rather than to a right to withhold performance. This is the hallmark of the doctrine of independent covenants.¹⁰⁵ In other words, *Hemingway*, which purports to apply contract doctrine to the lease in the same manner as *Javins* did, guarantees that the only way that the aggrieved tenant can receive a nonstatutory remedy substantially equivalent to that offered in *Javins*—setoff against rent owed plus retention of possession—is to seek relief in accord with the rule of independent covenants. This, perhaps more than any other factor, discredits the avowed adherence of the *Hemingway* court to the theory of dependent covenants.

Any inquiry into the source of this divergence must first overcome the barrier that many courts have been unable or unwilling to avoid—uncritical reliance on standard terminology. Words like “contract” and “property” and rules of “dependent” and “independent” covenants offer only conclusions, which do little to reveal the source of judicial reasoning. This fact is forcefully demonstrated by a comparison of *Javins* and *Hemingway*. From the tenor of the *Javins* opinion, it is evident that the court's choice of contract doctrine was motivated by pragmatic rather than purely theoretical considerations. Only contract doctrine, the court in *Javins* asserted, “allows courts to be properly sensitive to all relevant factors in interpreting lease obligations.”¹⁰⁶ The factors recognized by the court in *Javins* included the magnitude of the current housing shortage, the lack of opportunity to repair on the part of the tenant, the development and widening application of the area of products liability, and the unequal bargaining power of the prospective tenant in the housing market.¹⁰⁷

Under the fact situation in *Hemingway*, the rationale for looking to these factors seems even more compelling because the aggrieved

104. *Id.* The minority sets forth an equivalent independent covenants remedy. They state that on the occasion of the landlord's breach, the tenant may “elect to remain in possession, paying the full amount of the agreed rent under protest based on such violation, and then bring an action to recover the excess of the amount over and above the fair value of the occupancy of the deficient premise.” *Id.* at 854.

105. *See, e.g.,* *Myles v. Strange*, 226 Ala. 49, 145 S. 313 (1933); *see also* 1 AMERICAN LAW OF PROPERTY, *supra* note 28, § 3.11; Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903, 916 (1942).

106. 428 F.2d at 1075 n.13.

107. *Id.* at 1079.

tenants occupied public housing.¹⁰⁸ In public housing the shortage of available space is perhaps even more critical,¹⁰⁹ the opportunity for tenant repair is less realistic,¹¹⁰ and the reliance element, which weighs so heavily in the consideration of the impact of products liability, is more prominent than in private housing.¹¹¹ Moreover, the disparity in bargaining power has traditionally been even more pronounced in the public housing context. Standard residential leases, long considered "grotesque in their one-sidedness"¹¹² in the private sector, are widely considered more unconscionable in public housing.¹¹³ Public housing leases have long been punctuated with cognovit notices, exculpatory clauses, waivers and similar devices,

108. It was only in a subsequent case, *West Broadway Housing Task Force v. Commissioner of Dep't of Community Affairs*, 297 N.E.2d 505, 511 (Mass. 1973), that a court held that the tenant remedies embodied in Massachusetts statutory law were equally available to tenants in public housing.

109. Of the six million public housing units that the federal government is committed to build for low-income families, fewer than one million units had been completed by the end of the 1971 fiscal year. SUBCOMM. ON HOUSING OF THE HOUSE COMM. ON BANKING AND CURRENCY, 92D CONG., 1ST SESS., REPORT ON HOUSING AND THE URBAN ENVIRONMENT 24 (Comm. Print 1971). Roisman, *The Right to Public Housing*, 39 GEO. WASH. L. REV. 691, 700 (1971), reports that "there has been some progress, but the fundamental problem remains: there is not nearly enough public housing for those who need it." See A STRUGGLE FOR SURVIVAL: THE BOSTON HOUSING AUTHORITY 1969-1973 [A REPORT BY THE HOUSING TASK FORCE], Introduction—1 (1973).

110. The sheer size of the typical public housing project renders the costs of systematic repairs prohibitive for any tenant, or for that matter, group of tenants. The problem of repair funds is magnified by the fact that the residents of public housing are largely located in the lower economic brackets as a result of express federal policy (42 U.S.C. § 1402 (Supp. 1974)). The recently enacted Housing and Community Development Act of 1974, tit. II, §§ 2, 3, 88 Stat. 653-54, reiterates this commitment. Thus, even small repairs within the apartment may not be feasible. So-called repair-and-deduct remedies (e.g., CAL. CIV. CODE § 1942 (West Supp. 1974)) are, therefore, of little use to the tenant of public housing. *Green v. Superior Court*, 10 Cal. 3d 616, 630-31, 517 P.2d 1168, 1177, 111 Cal. Rptr. 704, 713-14 (1974), suggests that repair and deduct is likewise relatively worthless to the tenant in the private housing market because of the limits on the amount of rent that may be deducted and the number of times rent may be withheld.

111. Reliance is based largely on the lack of ability to control the conditions of market transactions. In this regard, the typical public housing tenant is powerless; he must rely on the public landlord because he has nowhere else to turn. Indritz, *The Tenant's Rights Movement*, 1 N.M. L. REV. 1, 109 (1971).

112. *Morbeth Realty Corp. v. Velez*, 73 Misc. 2d 996, 1000, 343 N.Y.S.2d 406, 411 (New York City Civ. Ct. 1971).

113. Schoshinski, *Public Landlords and Tenants: A Survey of the Developing Law*, 1969 DUKE L.J. 399, 466-67.

which drastically curtail the rights of tenants.¹¹⁴ Although definite steps have been taken to avoid such oppressive provisions,¹¹⁵ it is not clear whether these measures have had significant impact. In any event it seems unlikely, given the time sequence, that these steps had any effect upon the litigants in *Hemingway*.

The oppressiveness of a public housing tenancy, however, does not arise from these factors alone. Compounding the inequities is the fact that they exist and flourish under the aegis of the federal government.¹¹⁶ Although public housing is the culmination of an explicit federal commitment to offer better living environments,¹¹⁷

114. *Id.*

115. U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, PROHIBITION OF CERTAIN PROVISIONS IN LOW-RENT PUBLIC HOUSING LEASES, CIRCULAR NO. RHM 7465.6 (1970).

116. Schoshinski, *supra* note 113, at 465-66. As Schoshinski sees it, all of these factors operate to render the public housing lease "the epitome of a contract of adhesion." *Id.* at 468. Comparison with any standard definition of the contract of adhesion confirms Schoshinski's belief. *E.g.*, Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072, 1075 (1953): "[Contracts of adhesion are] agreements in which one party's participation consists in his mere 'adherence,' unwilling and often unknowing, to a document drafted unilaterally and insisted upon by what is usually a more powerful enterprise."

117. The public housing in *Hemingway* was financed completely by federal funds. Telephone conversation with Mr. George F. Mahoney, attorney for the Boston Housing Authority in *Hemingway*, Friday, Jan. 18, 1974.

42 U.S.C. § 1441 (1970) restated the federal commitment to housing in terms very similar to those contained in the first federal housing legislation, the United States Housing Act of 1937—that is, that the entire system of public housing is designed to provide "decent housing" for every American family. This commitment is renewed in the recently enacted Housing and Community Development Act of 1974, tit. I, § 101(d)(3), 88 Stat. 635. Under all federal legislation, the major part of the responsibility for operating subsidized projects is delegated to local housing agencies, who theoretically serve as nearly autonomous bodies. 42 U.S.C. § 1401 (1970). *See* Housing and Community Development Act of 1974, tit. II, § 2, 88 Stat. 653. The object of this policy is to assure that the role of the housing authority approximates as closely as possible the status of a private landlord. This autonomy is more theoretical than real, however. Because of their dependence on the federal government for funding, local housing authorities have always been accountable to the federal government to a great extent. *See* 42 U.S.C. § 1415 (1970). Other controls were added including the requirement of establishing "workable programs" as a condition to receiving aid. 42 U.S.C. § 1451 (1970). Such programs were directed at the general improvement of living conditions in public housing through enforcement of housing codes and self-government by tenants. *See generally* Rhyne, *The Workable Program—A Challenge for Community Involvement*, 25 LAW & CONTEMP. PROB. 685 (1960). The workable program (42 U.S.C. § 1451 (Supp. 1974)), has been whittled away by a number of legislative enactments, particularly in the area of leased public housing. *See* 1969 U.S. CODE CONG.

the officials who operate the system are largely unresponsive to tenant grievances.¹¹⁸ The relative passiveness of the federal government appears to represent a condonation of the abuses. Thus, the existing structure of federal public housing and the impotence of tenants within it assures that public housing tenants will have not only special problems, but also a "frustrating lack of ability to solve them."¹¹⁹

& AD. NEWS 1541. A hybrid form of the workable program, however, has reappeared in the Housing and Community Development Act of 1974, tit. I, § 104(a), 88 Stat. 639. In the interim, however, there has risen a potentially more effective vehicle for increased control—the HUD circulars. See note 118 *infra* and accompanying text. So influential have these circulars become that commentators are raising serious questions as to who actually controls the operations of public housing. Lefcoe, *HUD's Authority to Mandate Tenants' Rights in Public Housing*, 80 YALE L.J. 463 (1970); Note, *HUD's Authority to Mandate Effective Management in Public Housing*, 50 J. URBAN LAW 79 (1972); see *Housing Authority v. United States Housing Authority*, 468 F.2d 1 (8th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973). However, up to now no formal administrative measures have been developed through which the tenant could realistically enforce the obligations imposed by these circulars. Note, *Remedies for Tenants in Substandard Public Housing*, 68 COLUM. L. REV. 561, 568 (1968). Moreover, because of lack of standing no single tenant has been able to compel judicially the use of the potential sanctions available in the federal program to improve substandard living conditions. *Id.* at 566-67. This protective buffer does, however, show some signs of breaking down. In *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045 (D.C. Cir. 1971), it was held that individual tenants had standing to litigate the issue whether the Department of Housing and Urban Development had the responsibility to enforce the commitment to "decent housing." See also *Garrett v. City of Hamtramck*, 335 F. Supp. 16, 26 (E.D. Mich. 1971):

In administering the Act [Housing and Urban Development Act of 1969] the Department of Housing and Urban Development must continuously assure that violations do not occur and must keep in mind the central purpose of the Act, that is, the "realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family."

118. Genung, *Public Housing—Success or Failure?*, 39 GEO. WASH. L. REV. 734, 748 (1971). In accordance with a HUD circular (U.S. DEPT. OF HOUSING & URBAN DEVELOPMENT, GRIEVANCE PROCEDURE IN LOW-RENT PUBLIC HOUSING PROJECTS, CIRCULAR NO. RHM 7465.9 (1971)), the Boston Housing Authority has responded to these problems by instituting a new "lease and grievance procedure," which "establishes the right of the tenant who gets no adequate response from the Authority where there is a severe maintenance problem to withhold his rent." The procedure of the Boston Housing Authority also establishes an "impartial hearing board of tenants and staff" to resolve complaints. This approach, which may have resolved many of the problems faced by the *Hemingway* court, did not become effective until *Hemingway* had proceeded far into the appeal process. A STRUGGLE FOR SURVIVAL, *supra* note 109, at VI-14.

119. Indritz, *supra* note 111, at 109.

Although the *Hemingway* court takes careful note of the factors set out in *Javins*,¹²⁰ neither the majority nor minority significantly treats the public housing context.¹²¹ While the court's reason for this omission remains speculative, avoiding the public housing environment—and the pro-tenant sympathies it arouses—does allow the court to look into the problems created by liberal tenant remedies. Indeed, the *Hemingway* court seems to balance the immediate needs of the tenant against the ultimate need to avoid housing standards so rigid and unfavorable from the landlord's point of view as to cause him to abandon his building entirely. Although the *Javins* decision rests on the tacit assumption that liability is imposed upon an enterprise to encourage the development of a safer, better enterprise, the court ignored the possibility that this causal model could break down in the housing area simply because the imposition of liability could act to decrease the availability of the target product.¹²²

Under the strict *Javins* approach, the residential landlord may find himself in a much less favorable financial position. In formulating a less drastic remedy, the *Hemingway* court seems cognizant of the potential for increasing the existing housing shortage by an attractive short-run response.¹²³ The landlord under the *Hemingway* holding is immediately restored to possession of the premises upon the tenant's decision to withhold rent; the court so responds "as a matter of policy."¹²⁴ The nature of that policy seems clear: it is not to develop in a vacuum more liberal defensive remedies, but rather to establish compromise as an essential element of any remedy offered to the residential tenant.

The origin of this fundamental policy of compromise is found in the statutory rent withholding remedy. According to the statute, the landlord stands to recover the full amount of rent withheld upon remedying the defects in the premises.¹²⁵ This is a rather clear rejection of the contract principle that the wronged party be made

120. 293 N.E.2d at 841-42.

121. The concurring opinion refers to the fact that the Boston Housing Authority is classified in the tenant's briefs as a "public body," but does not pursue the matter further. 293 N.E.2d at 846.

122. See Sandler, *Strict Liability and the Need for Legislation*, 53 VA. L. REV. 1509, 1512 (1969).

123. See Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1111-12 (1971). See generally O'Donnell, *The Rights of Landlords: Are They Threatened by Drive Against Slum Property*, Wall St. J., Feb. 4, 1964, at 16 col. 4.

124. 293 N.E.2d at 853-54 n.3.

125. MASS. GEN. LAWS ANN. ch. 239, § 8A (Supp. 1974).

whole by the assessment of damages. The tenant certainly does not receive all that he bargained for under the lease and, in fact, he must elect to forgo his normal remedy¹²⁶ for the opportunity to receive the object of the original bargain. By supplying this "incentive to repair,"¹²⁷ the hope is to make the performance of an obligation already contracted for an attractive alternative for the landlord.

Just as the *Hemingway* compromise is vulnerable to the vagaries of the market and resourcefulness of the individual participants in a dispute, so is the statutory rent withholding provision subject to abuse. Although the statute was passed with the intent "to promote prompt repairs,"¹²⁸ it is doubtful whether it is capable of accomplishing that objective. The statutory rent withholding remedy only serves to postpone the landlord's receipt of the entire rent obligation until repairs are completed. Since the rent withholding statute is silent on the period of time within which the landlord must repair the premises to collect the full amount of rent upon repair, the landlord can recover all the withheld rent by repairing at his own convenience. In many cases, the landlord's need for funds will force quick repair. However, for the landlord with a ready source of capital, the knowledge that he will receive the full amount of rent upon the completion of repairs, whenever he wishes to undertake those repairs, might make him more apathetic toward this responsibility.¹²⁹

126. The tenant's normal remedy would be a return of that amount of the rent paid for benefits never received.

127. 293 N.E.2d at 844.

128. 293 N.E.2d at 845.

129. *Withholding Rent: New Weapon Added to Arsenal for War on Slumlords*, 21 J. HOUSING 67, 70 (1964); Schorr, *Only As Much As The Rents Will Bear*, 24 J. HOUSING 33, 36 (1967). It should be noted that the landlords who would be able to sustain themselves during a rent-less period are the entrepreneurial absentee landlords, who, in many cases, are the most flagrant offenders of housing and health codes. See G. STERNLIEB, *supra* note 90, *passim*.

A wiser alternative to Massachusetts General Laws ch. 239, § 8A is to exact a percentage deduction of the rent to be remitted for the time the tenant had to tolerate an uninhabitable dwelling. See, e.g., ILL. REV. STAT. ch. 23, §§ 11-23 (Supp. 1974). The sole concession that *Hemingway* makes to the time element is the use of the period of uninhabitability as one of its five criteria for evaluating the materiality of the breach of the implied warranty of habitability. See note 41 *supra*. It should be noted that *Javins* provides a hedge against delay of repairs in the absence of a time limit statute. The *Javins* holding implies that incidental and consequential damages may be awarded for injuries suffered by the tenant or his family before repair, since the court states it extends all contract remedies, including the extraordinary remedy of specific performance. 428 F.2d at 1082 n.61.

It cannot be denied, then, that the byproducts of the statutory compromise may be undesirable in a given situation; however, such results are not an indication that the compromise approach is untenable. Under the statute the landlord has made a substantial concession since the tenant continues to occupy the premises without paying rent. This element of bargaining is a device whose merits even the most outspoken adversaries of the urban slumlord are forced to recognize.¹³⁰ Unfortunately, what the *Hemingway* court offers in an attempt to fulfill the policy of the legislature is not a compromise in the true sense of the word. All its terms are dictated by the needs of the landlord, rather than by a rational balancing of the interests of both landlord and tenant. As a result, the tenant is subjected to the pitfalls of compromise while reaping none of the benefits.

The severity of this result from the tenant's point of view also raises grave doubts as to the future directions of landlord-tenant law. The court's noncommittal attitude toward the public housing context in which *Hemingway* arose is particularly ominous. In contrast to the situation in the private sector, the interests of the landlord and the tenant in public housing are, conceptually, at least, far from adverse.¹³¹ Attitudes are not polarized by the profit motive, as they

130. Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869, 920 (1967). In what is a rather harsh indictment of the slum landlord, the authors interject: "[I]t is to be hoped that the slum housing market can be brought to its knees relatively gradually, so that the legislatures may have some time to act before a great many landlords are immediately threatened."

131. This is not meant to indicate that many of the same forces that move the private landlord to demand concessions from his tenants are not equally crucial in public housing. Basically, both public and private landlords are faced with the very substantial financial challenge of meeting increased repair responsibilities after a long period of dependency on a pattern of neglect of maintenance. A STRUGGLE FOR SURVIVAL, *supra* note 109, at I-3, notes that since 1964, operating expenses have risen some 40 percent. See generally F. DELEEuw, OPERATING COSTS IN PUBLIC HOUSING: A FINANCIAL CRISIS (1970).

To appreciate the dimensions of the maintenance problem in public housing, it is necessary to get an overview of the budgetary structure of federal public housing. For an extended period of time, the federal government extended aid sufficient to cover only the capital expenditures of public housing. Operating costs were covered by the rent of the tenants. It was recognized that this budget had to be closely watched in order that the costs be kept low to accommodate those most in need of public housing. Thus, the approach of public housing agencies was simply to neglect making substantial repairs to keep operating costs within reason. Legislative measures have been passed in recent years to provide extra funds. 42 U.S.C. § 1468 (1970) was the first such measure. Apparently, however, it did not have the anticipated impact; in the new Housing and Community Development Act of 1974, several measures have been set forth to provide extra funds for both extraordinary and rou-

are in the private sector.¹³² Because the aims of public housing legislation are community aims, it is only logical to expect the courts to attempt to maintain that conceptual difference. If the *Hemingway* court discerns a compelling need to effect a one-sided compromise in the public housing context, *quaere* the extent to which a court similarly motivated would go "as a matter of policy" to satisfy the private landlord.

A more balanced resolution of the problem before the *Hemingway* court could be reached by recognizing the integrity of both of the landlord's covenants—to transfer possessory rights and to provide a habitable dwelling.¹³³ The best vehicle for such a strategy is to interpret the residential lease as a divisible contract with separate consideration allocated to the separate obligation of the landlord—to transfer a physical space and to maintain that space.¹³⁴

tine repairs. It is strongly suggested that the breadth of federal aid given by way of the annual fund allocation (The Annual Contributions Contract) may be subject to a case-by-case approach depending upon the peculiar condition of federal housing in question. The cost of operation is specifically listed as one factor to be considered in funding in the Act, tit. II, § 5(b), 88 Stat. 657.

132. In a private housing market, the profits of the landlord are a limitation on any duty imposed on the landlord. See Note, *The Plight of the Indigent Tenant: The Failure of the Law to Provide Relief*, 5 SUFFOLK L. REV. 213, 220 (1970). Liberal tenant remedies are based on the "questionable assumption that the slum landlord can be compelled to rehabilitate his own property and still further his own goal." G. STERNLIEB, *supra* note 90, at 88, suggests that the return to the sluml原因, though not insubstantial (about 10-12 percent) must compensate him for more than his investment. It must pay him for the less-than-exalted position of the sluml原因 in society and the risks inherent in the trade. *Id.* at 95-96. See also Kahn, *We Need More Sluml原因*, SATURDAY EVENING POST, Dec. 17, 1966, at 8.

It should be mentioned that studies on landlord profits necessarily focus on the successes in the market, the survivors. All indications are that they are becoming a vanishing breed. See generally Fried, *Worsening of Slum Housing Abandonment is Feared*, N.Y. Times, Feb. 26, 1974, at 1, col. 4. The recently enacted Housing and Community Development Act of 1974 refers to this dangerous trend. Among Congress's most significant findings in considering the bill were "that the deterioration and abandonment of housing for the Nation's lower income families has accelerated over the last decade, and that this acceleration has contributed to neighborhood disintegration . . ." Tit. VIII, § 801(b), 88 Stat. 721.

133. See note 31 *supra*.

134. See text accompanying notes 30-31 *supra*. The proposal for divisibility of the lease contract is to be contrasted with divisibility characterized by the mere periodic nature of payments under the typical residential lease. This latter brand of divisibility is addressed to the economic convenience of the tenant and is not responsive to the tenant's need to retain possession, on

A divisible contract approach is desirable because of its ability to reconcile pragmatic and theoretical considerations surrounding the residential tenancy. The status of components of the residential lease seems to be perfectly consistent with the definition of the divisible contract:

The essential test to determine whether a number of promises constitute one contract or more than one is simple. It can be nothing else than the answer to an inquiry whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.¹³⁵

It might be deduced from the preeminence of the possessory interest¹³⁶ that the low-income tenant in today's housing market would, in many cases, accept the lease without the assumption by the landlord of an obligation to maintain habitable premises. In other words, there would be a bargain notwithstanding the absence of a duty to repair on the part of the landlord. Thus, the obligation to transfer possession could be construed as divisible from the obligation to maintain habitable premises. The only obstacle to such a construction is that the landlord's covenants are not divided by the terms of the lease. This problem is easily overcome, however, since judicial precedent has firmly established the power of the courts to inquire into whether divisibility is authorized by the terms of a contract when it is not expressly set forth in the form of the contract.¹³⁷ Moreover, construing the lease as a divisible contract more accurately reflects the method by which the landlord fixes the lease price. In fact, although separate considerations are not recited in the lease the typical landlord does accord separate considerations to the possessory interest and maintenance services when figuring a lease price.¹³⁸

A more important reason for construing the lease as a divisible contract is the practical value of the theory for resolving the conflict-

the one hand, and the landlord's need for a guaranteed return on his investment while he is allegedly in breach of his obligations under the lease contract.

135. 6 WILLISTON § 863.

136. See notes 65-69 *supra* and accompanying text.

137. See, e.g., *Producer's Coke Co. v. Hillman*, 243 Pa. 313, 316, 90 A. 144 (1914); cf. RESTATEMENT OF CONTRACTS § 266, comment f (1932). This principle is well-settled in transactions involving the sale of goods. UNIFORM COMMERCIAL CODE § 2-612. See also *id.*, Comment 1.

138. Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 FORDHAM L. REV. 225, 253-54 (1969).

ing interests of the landlord and the tenant. If the obligation to refrain from disturbing the possessory interest and the obligation to repair were not considered inextricable, the landlord would always receive the value of the possessory interest if the tenant remained in occupancy, even when the premises were uninhabitable. Indeed, if we are to believe the landlord, the basis of his grievance is not the tenant's retention of the possessory interest, but rather his own need for ready funds to meet expenses, to perform needed repairs and to show a profit.¹³⁹ If this desire is satisfied by the continuing flow of funds in payment for the possessory interest, it should be the only concession necessary to keep the landlord in the housing market. There is no reason to make possession, the most critical element of the lease transaction, a negotiable item in the effort to reach a compromise.

Unfortunately, economic conditions have frustrated this proposal. Today divisibility and the assurance of the availability of that portion of rent allocated to the possessory interest may not offer a sufficient economic cushion to the landlord. As the costs of repairs and other services rise, the consideration allocated to the possessory interest seems destined to shrink to the point where the income from the possessory interest would be inadequate to maintain the dwelling at even the most minimal level of repair, much less fulfill the landlord's desire to realize some return on his investment. Thus, there should be, upon the occasion of any jury trial on a question of rent withholding, mandatory provision for deposits into court of the exact amount of rent due for the service functions under the lease.¹⁴⁰ The funds should be made available to the landlord under the scrutiny of the court.¹⁴¹ Such a tactic seems to be in accord with contract theory since, in the typical dependent covenants situation, no action by the wronged party will lie until he himself has performed or offered to perform his own covenant.¹⁴² The object of the proposal is

139. See Committee on Leases, *Trends in Landlord-Tenant Law Including Model Code*, 6 REAL PROPERTY, PROBATE & TRUST J. 550, 588-89 (1971).

140. *But cf.* Bell v. Tsintolas Realty Co., 430 F.2d 474, 484 (D.C. Cir. 1970). The court suggests that deposit of the full rent may not be required if the tenant makes a "very strong showing" of uninhabitability.

141. Escrow funds are not favored since they typically are not within the domain of the court. The sporadic nature of the expenses incident to the operation of a residential structure demands accessibility of the funds.

142. 3 CORBIN § 658; see UNIFORM COMMERCIAL CODE § 2-609. See also Bell v. Tsintolas Realty Co., 430 F.2d 474, 482 (D.C. Cir. 1970):

[N]ormally the burden of such a prepayment order on the tenant will be neither heavy nor unexpected: to require that the tenant meet current rental payments during the litigation period is to require only

to offer the landlord, as well as the tenant, a predictable remedy. This is the only means of assuring that the financial security of the landlord and the retention of possession by the tenant will be compatible.

The decision in *Hemingway* exposes some heretofore concealed issues in landlord-tenant law and ignores some obvious ones. It does little to aid the plight of the modern residential tenant.¹⁴³ Indeed, the merger of contract theory and legislative policy which the court proposes carries the potential for even more damaging effects in the long run. The common law warranty of habitability provides still more variables to consider in an area of the law that has long been uniquely susceptible to confusion and a lack of predictability.¹⁴⁴ More importantly, the court's disregard for the significance of the possessory interest seems to conflict with the essential duality¹⁴⁵ of the residential lease transaction as both a contract and a conveyance.

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that he fulfill an obligation which he voluntarily assumed at an earlier date when he entered into the lease.

But cf. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

143. The court implies, however, that the decision it reaches will have far-reaching effects for the residential tenant. The majority states that it does "not purport to forecast all the changes that will arise from our new common law rule." 293 N.E.2d at 843 n.14.

144. See Committee on Leases, *supra* note 139, at 555.

145. "[I]t is idle to speculate whether the land or the promise is the principle element of a lease of an apartment with a promise to furnish heat The bargain is for both. If the warp is conveyance, the woof is contract and neither alone makes a whole cloth." 1 AMERICAN LAW OF PROPERTY, *supra* note 28, § 3.11.